BNA

PRIVACY & SECURITY LAW

BNA Employee-Owned Since 1947

REPORT

Consumer Information

Direct Marketing

California has in recent years established a *de facto* national privacy standard by enacting laws such as S.B. 1386 (security breach notification) and A.B. 68 (online privacy notices). Less well known is that another first-of-its-kind California privacy law will become effective Jan. 1, 2005. S.B. 27 imposes a new disclosure obligation on certain businesses that share their customers' personal information with third parties for direct marketing purposes. Companies doing business in California should begin their S.B. 27 compliance efforts now in order to be ready for the upcoming compliance date.

California S.B. 27 and Direct Marketing Disclosures: Preparing for the Upcoming January Compliance Deadline

BY REECE HIRSCH

It's no secret that California has in recent years established a *de facto* national privacy standard by enacting such cutting-edge laws as S.B. 1386 (security breach notification) and A.B. 68 (online privacy notices).

Reece Hirsch is a partner in the San Francisco office of Sonnenschein Nath & Rosenthal LLP, specializing in privacy and security law. He can be reached at (415) 882-5040 or rhirsch@sonnenschein.com.

It is less well known that another first-of-its-kind California privacy law will become effective Jan. 1, 2005. Senate Bill 27, signed into law by Gov. Gray Davis (D) Sept. 24, 2003, imposes a new disclosure obligation on certain businesses that share their customers' personal information with third parties for direct marketing purposes.

S.B. 27—An Overview.

S.B. 27 applies to all business with 20 or more full or part-time employees that have established a business relationship with a customer residing in California and have within the immediately preceding year disclosed

such customer's information to third parties for direct marketing use. Commencing Jan. 1, 2005, California Civil Code Section 1798.83 will require that, upon request by a California resident, businesses that share the customer's personal information with a third party for direct marketing purposes must disclose what type of personal information they shared, and the names and addresses of the entities that received it.

It is important to note that S.B. 27 does not impose any new restrictions on how direct marketing is conducted. The new law also does not require that any disclosure be made to a customer that has not requested information regarding a business's direct marketing disclosures. S.B. 27 simply requires that certain information regarding a company's business practices be disclosed, after the fact, to customers who request it.

Summarizing the intent of S.B. 27, state Sen. Liz Figueroa (D), the sponsor of the legislation, stated, ''Current privacy notices say nothing specific about what information is shared and what businesses get it. Consumers have the right to know what personal information is sold and whether it is sold to reputable affiliates, fly-by-night companies or adult businesses. It is time to shed light on these profiling practices so we can see which companies value our privacy and which ones don't. Hopefully, this bill will provide an incentive for businesses either to stop the sale of our information entirely or, at the very least, prompt businesses to adopt privacy policies that give every consumer the power to opt out of such sales, even among affiliated companies.''

In contrast, the Direct Marketing Association has called S.B. 27 ''a serious attack on direct and interactive marketing in a state that accounts for over $60 billion in sales.''

'Established Business Relationship' Must Exist.

In order for S.B. 27 to apply, a company must have an ''established business relationship'' with a California resident. An ''established business relationship'' is defined as a ''relationship formed by a voluntary, two-way communication between a business and a customer, with or without an exchange of consideration, for the purpose of purchasing, renting, or leasing real or personal property, or any interest therein, or obtaining a product or service from the business, if the relationship is ongoing and has not been expressly terminated.'' If the relationship is not ongoing, an established business relationship still exists if the customer purchased, rented, or leased real or personal property from the business within the past 18 months.

Under this definition, a California resident who requests e-mail bulletins regarding a company's products through its corporate Web site probably creates an ''established business relationship'' under S.B. 27, because the individual has engaged in a voluntary, two-way communication for the purpose of obtaining a product or service (*i.e.*, the e-mail update service and the products that may be purchased as a result). However, if the customer never purchased the company's product and terminated the e-mail bulletins in December 2003, then this would not constitute an established business relationship triggering S.B. 27 compliance because: (i) the law only applies to relationships that existed in the immediately preceding year, commencing on the compliance date of January 1, 2005; and (ii) the law does not apply to terminated business relationships that do not involve the purchase, rental or lease of real or personal property.

Personal Data Must Be Shared.

S.B. 27 applies if a business discloses ''personal information'' to third parties if the business knows or reasonably should know that the third party used the personal information for direct marketing purposes. ''Personal information'' is broadly defined as ''any information that when it was disclosed identified, described or was able to be associated with an individual.'' The law provides 27 specific examples of personal information, from name and address to political party affiliation.

''Direct marketing purposes'' does not include the use of personal information by a tax-exempt organization to solicit charitable contributions or for political communications or fundraising. Also exempted from the definition of direct marketing are certain types of disclosures to third parties that: (i) use personal information to effectuate a customer's transaction, such as IT vendors and third-party call centers; or (ii) purchase customer accounts, such as a company that acquires an entire line of business and related customer accounts. A common thread in these exemptions for disclosures to third parties is that in each case the third party is providing, or aiding in the provision of, the product or service sought by the customer and is not engaging in direct marketing activities unrelated to that product or service.

Significantly, several activities are expressly deemed not to constitute disclosures for direct marketing purposes, such as disclosures to third parties that: (i) process or store personal information for a business, if they do not engage in certain prohibited disclosures; or (ii) market products or services to customers with whom the business has an established business relationship so long as the third party does not engage in marketing activities on its own behalf. Certain disclosures to a third party for purposes of jointly offering a product or service are also exempted.

Disclosures by a business to an affiliate are considered disclosures to a third party under S.B. 27. However, businesses must carefully review affiliate-sharing relationships to determine whether the relationship satisfies one of the statute's exceptions, such as those summarized above.

Notice of Direct Marketing Activities.

A business may comply with S.B. 27 by providing, upon request of the customer, a notice that describes with respect to the preceding calendar year: (1) the categories of personal information disclosed to third parties for direct marketing purposes and (2) the names and addresses of the third parties. If the name and address of the third party are not sufficient for a customer to determine the nature of the third party's business, the business must include examples of the products or services marketed by the third party.

A business must designate a mailing address, e-mail address, or toll-free telephone or fax number to receive customer requests for the S.B. 27 notice . The designated addresses or numbers for obtaining the notice

  PVLR ISSN 1538-3423

must be provided to customers by either: (1) notifying all agents and managers who directly supervise employees who have contact with customers; (2) posting a link on the home page of the company's Web site that meets specified format requirements; or (3) making them available at every place of business in California where the business or its agents have regular contact with customers.

It is not necessary for a business to tailor its notice to the information disclosed with respect to the requesting customer. A notice generally describing a company's direct marketing disclosures is sufficient.

If a customer requests the S.B. 27 notice through the designated channels, the business must respond within 30 days. If the customer submits his or her request through another address or number, the business must respond within a reasonable period, but no more than 150 days from the date of receipt. A business is only required to respond to a customer's request for an S.B. 27 notice once per calendar year.

Privacy Policy With Opt-In or Opt-Out.

As an alternative to providing the S.B. 27 notice, a business may comply with the law by establishing a privacy policy allowing customers to opt-in or opt-out of such information-sharing, notifying their customers of the policy, and providing a cost-free means of doing so. Of course, administering an opt-in or opt-out mechanism typically poses significant operational challenges, which may very well be greater than those associated with S.B. 27's notice process.

Relationship to S.B. 1 And Gramm-Leach-Bliley Act.

It is useful to view S.B. 27 as an extension of certain privacy measures contained in the federal Gramm-Leach-Bliley Act (GLBA) and the California Financial Information Privacy Act, also known as S.B. 1, to many entities that are not financial institutions. S.B. 1, which became effective on July 1, 2004, imposed more stringent privacy obligations upon GLBA-covered financial institutions in California. Financial institutions, such as banks and insurance companies that are subject to S.B. 1, are exempted from compliance with S.B. 27. For financial institutions that are subject to the federal GLBA statute, but not S.B. 1, the S.B. 27 notice may be combined with the institution's GLBA-required privacy notice.

Like GLBA and S.B. 1, SB 27 is a notice-based statute, and does not seek to impose prescriptive requirements on a company's privacy practices. S.B. 27 further resembles GLBA and S.B. 1 in its focus upon the privacy of personal information obtained for consumer, rather than business, transactions. S.B. 27's definition of ''customer'' is limited to California residents providing personal information pursuant to an established business relationship ''if the relationship is primarily for personal, family, or household purposes.'' Therefore, if a business obtains personal information from individuals only when they are acting as the proprietor of a business or an officer of a corporate entity, then the business would not be required to comply with S.B. 27.

Penalties and Defenses.

In addition to the legal remedies provided under current law, an individual customer would be entitled to recover a civil penalty of up to $500 per violation (and up to $3,000 per willful, intentional or reckless violation) and attorneys' fees and costs for a violation of S.B. 27.

Unless a violation is willful, intentional, or reckless, a company may assert as a complete defense to an S.B. 27 action that its failure to provide a timely or accurate direct marketing notice was corrected within 90 days of the date that the business learned of the deficiency.

Preparing for S.B. 27 Compliance.

Companies doing business in California should begin their S.B. 27 compliance efforts now in order to be ready for the Jan. 1, 2005, compliance date. The initial steps in an S.B. 27 compliance effort should include the following:

(1) Determine whether your organization engages in disclosures of personal information for direct marketing purposes subject to S.B. 27.

(2) If S.B. 27 compliance is required, make the decision now regarding whether you will comply by means of an S.B. 27 direct marketing notice or through a privacy policy with opt-in or opt-out. Implementation of either approach to compliance may require considerable lead time, particularly for large companies with a significant number of California customers.

(3) For national companies, consider whether it is possible to comply with S.B. 27 only with respect to California customers or whether it is necessary to adopt S.B. 27's requirements as a national standard for your organization.

(4) If your business intends to prepare an S.B. 27 direct marketing notice, begin compiling a list of third parties receiving direct marketing disclosures and the specific categories of information that are being disclosed.